Buddy & Pals, Inc.

District 1

499 East Summit Street Crown Point, Indiana 46307

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Permittee, Buddy & Pals Inc., 499 East Summit Street, Crown Point, Indiana 46307 (Permittee) is the holder of a type 103 and 210-1, Alcohol and Tobacco Commission (ATC) permit, permit #RR45-19200 and RR45-19201. The Permittee filed its application for renewal on April 22, 2002 and said application was assigned to the Lake County Local Board (LB) for hearing. The LB heard the renewal request on July 3, 2002, and on that same day, voted 3 – 1 to recommend that the renewal be granted. The ATC adopted the recommendation of the LB on July 16, 2002, and granted the renewal.

The remonstrators filed a timely notice of appeal and the matter was assigned to ATC Hearing Judge, Mark C. Webb (HJ). The HJ assigned the matter for hearing on February 28, 2003, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Permittee was represented by attorney Bruce A. Lambka. The remonstrators were represented by attorney Geoffrey G. Giorgi. The HJ took judicial and administrative notice of the entire ATC file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

II. EVIDENCE PRESENTED BEFORE THE LOCAL BOARD

A. WITNESSES FOR THE PERMITTEE. The following witnesses testified before the LB on behalf of the permittee in this cause:

¹ Liquor, beer and wine retailer located in an incorporated area of a town having a population of less than 20,000 inhabitants. *See*, IC 7.1-3-20-11.5. Though not itself subject to the quota requirements of IC 7.1-3-22-3, this permit requires an underlying one-way or two-way permit which is subject to the quota requirements of IC 7.1-3-22-3. In this case, the permittee has the underlying beer retailer permit, and also holds a Type 220 Sunday sales permit at the above location.

² The LB record shows that members Richard Harrigan, Lee Paitsell and State Excise Police Officer Alvin Taylor voted in favor of the renewal. The fourth member, Alma White, voted against renewing the permit citing the public nuisance rule, 905 IAC 1-27-2. A transcript of the LB hearing provided for the record does not disclose the actual discussion regarding the vote.

- 1. Robert D. Kuzman, attorney.³ Mr. Kuzman testified that permittee had been open approximately one year and had not received a single ATC violation. He indicated that Timothy Heidbreder, owner of the permit premises, is a person of high moral character and committed to the economic betterment of Lake County. All of his employees have been through the ATC server training programs. He disputed the claim that Mr. Heidbreder had deceived anyone during the zoning process, and indicated that everyone had ample opportunity to inquire of him as to what he intended to do with the property.⁴ He stated that the permittee has on its own called the police for assistance when disturbances broke out.⁵ Mr. Kuzman closed his presentation by indicating that the problems of which the neighborhood complains are insufficient to show Mr. Heidbreder's lack of good character and reputation and that the permit should be renewed.⁶
- 2. Bruce A. Lambka, attorney. Mr. Lambka disputed the accusation that the permittee or anyone else on its behalf had misled the neighborhood residents during the zoning process. He stated that the permit premises is located in an area that is primarily commercial, with residential area on the edge. He characterized the nature of permittee's business before the zoning board as "retail business" and that permittee is "indeed a retail business."
- 3. Maribeth Rupcich, a relative of Timothy Heidbreder. She vouched for Mr. Heidbreder's character and stated that he has a great deal of time and money staked in his reputation and that he would never do anything hurt it. She indicated that the bar has a nice neighborhood feel. She said that the bar could only go so far in controlling the conduct of its patrons outside the premises, but if liability was going to be placed on Mr. Heidbreder, that the permit premises was not the only problem location.
- 4. Rick Rupcich, Timothy Heidbreder's brother-in-law. As an attorney, he objected to the characterization of the B2 business categories as mutually exclusive of one another. He indicated that they overlap and that the permit premises certainly qualifies as a retail business. He further objected to the disparaging comments regarding Mr. Heidbreder's character and reputation within the community based on the zoning proceedings.

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³ Although Mr. Kuzman is one of two attorneys representing the permittee in this action, he presented the bulk of the permittee's presentation before the LB. Therefore, this HJ will characterize his comments as testimony where the context so warrants.

⁴ This HJ essentially agrees. Parties seeking state or local authority to operate a business over actual or potential opposition have the right to make strategic decisions during the application process and are not under an obligation to make their opponent's case for them.

⁵ Mr. Kuzman noted that the permittee's calls to law enforcement had resulted in arrests for driving under the influence and disorderly conduct.

⁶ Mr. Kuzman referenced *Hanley v. East Indiana Investment Corporation*, (1999), Ind.App., 706 N.E. 576 as support for the proposition that the remonstrators had failed to prove that Mr. Heidbreder's character or reputation in the community warranted non-renewal of the permit. However, the remonstrators focused their attack on whether the permit premises had become a public nuisance. This HJ sees only the need to substantively address this second issue.

⁷ Because Mr. Lambka, as the permittee's other counsel in this matter, provided factual information, his comments will be characterized as testimony where the context so warrants.

5. Carol Anderson, resident of Bridgeport neighborhood. She was the person who took the photograph of the helicopter landing⁸ The incident did not bother her at all and she feels that the remonstrators' position in this case is akin to a witch hunt. She has lived in the area for 6 years before the permit premises located there and she has had identical noise and trash problems during that time. She has no problem with the presence of the permit premises. She said that she had eggs thrown against her house because she would not sign the neighborhood remonstrance against the bar.

B. WITNESSES FOR THE REMONSTRATORS. The following individuals testified before the LB in opposition to the renewal of the permit in this cause:

Geoffrey G. Giorgi, attorney. Mr. Giorgi testified that the Bridgeport area of 1. Crown Point is primarily residential. According to Mr. Giorgi, the permittee deceived the local Crown Point Plan Commission and area residents when he applied for zoning changes for the permit premises because he labeled the his development as a retail business as opposed to an eating and drinking establishment. Permittee was aware of the 1995 attempt by another bar owner to put a bar in the neighborhood which was defeated by a remonstrance during the zoning proceedings when the bar owner stated directly that he intended to place a bar at the location in question. Additionally, the permittee failed to tell anyone that he was putting a bar in the location until after the necessary zoning changes had been made and he applied for a permit. The first opportunity the Bridgeport residents had to object to the project was the LB hearing on the initial permit. 10 The permittee claimed to have a restaurant on the premises, but in actuality operates a bar. 11 He further stated during the application process that he was the operator of a restaurant when there was no building at the location. ¹² He also indicated that alcohol was dispensed at the location on Sundays between October 8, 2001 and November 21, 2001, when the Type 220 license was issued. However, no citations were issued for these

¹²See, fn. 43, *infra*.

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⁸ See. ATC Exhibit 63. infra.

⁹ Even though Mr. Giorgi represents the remonstrators, he presented the bulk of the remonstration before the LB. Therefore, this HJ will characterize his comments as testimony where the context so warrants. ¹⁰ While the remonstrators may be unhappy that they were not fully informed during the zoning process, that has no bearing on the function of the LB in the permit process. The fact remains that in accordance with the purpose of the LB hearings, the remonstrators were given a full and fair opportunity to be heard. Indeed, for ATC purposes, the LB hearing is supposed to be the first opportunity for remonstrators to voice their opposition to a permit.

The remonstrators confuse the distinction between a "restaurant" and a "bar" for purposes of holding a retail permit. In order to sell alcohol at retail, a permit premises must have a restaurant attached which is capable of serving 25 people at a given seating. There is no question that the permit premises meets this requirement. There is no requirement that they actually sell or serve the food. They only need have it available. The remonstrators claim that the permit premises is a "bar" and thus fails the character of business test found in IC 7.1-3-1-19 because a bar must have a restaurant which meets the requirements of IC 7.1-3-20-9. However, even though the statute uses the term "restaurant permit", what it means is a retail permit. In short, even if permittee were to make 100% of his sales through the sale of alcohol, so long as food was available even though not purchased, he would still qualify to hold the permit.

- supposed violations. Mr. Giorgi further complained that permittee failed to post the sign required by IC 7.1-3-1-28.¹³, and that it engaged in unlawful forms of price discrimination. He alleged that alcohol was served at the tailgate parties without a temporary permit and that the area was not fenced in as required by law.¹⁴ Mr. Giorgi played a videotape which apparently showed numerous disturbances of the peace and incidents of public indecency which occurred outside the permit premises in the parking lot and a nearby overflow parking lot.¹⁵
- 2. Sue Miller, a resident of the Bridgeport neighborhood. She testified that because of the way the zoning process was conducted, that the neighborhood residents never had an opportunity to object to the presence of the bar. She says that the residents have attempted to work out their differences with Tim Heidbreder but without success. When Spring, 2002 occurred, the noise problems worsened. She mentioned the October 12, 2001 helicopter incident. She and other neighbors have witnessed patrons taking beer and liquor outside of the bar and off premises. She thought Mr. Heidbreder had not taken the neighbors' concerns seriously and that he made light of their parking lot issue and other matters with his "free parking" sign one weekend and the caption "oops, somebody complained" on his website. She read a letter from Crown Point City Councilpersons Paul Bremer and Pam Roth, requesting that the LB deny the renewal of the permit premises.
- 3. Maryanne Juarez, a resident of the Bridgeport neighborhood. She said she is constantly bothered by people coming and going from the bar late at night. They are yelling, swearing, or otherwise disturbing what was a quiet neighborhood before the bar moved in. She said the way the permittee dumps its trash at night is so loud that it wakes people up. She is worried about the safety and appearance of her property. On one occasion, a couple of months before the LB hearing, she found an individual on her property who was so

¹³ That section was effective only for applications filed after June 30, 2001. Mr. Heidbreder's application was filed on June 1, 2001, and he is therefore not subject to the requirements of the statute.

¹⁴ Remonstrators do not provide any underlying facts to support their allegations of illegal Sunday sales and no citations were issued to permittee during this time. However, this HJ wishes to make clear that if any Sunday sales occurred before February 7, 2002, they were in violation of permit authorization. To the extent that they are referencing the tailgate party(ies), during these events, the permit premises were locked and the participants in the tailgate party furnished their own alcohol. Because permittee was not serving any alcohol at this event, Rule 41 regarding the beer garden requirements is inapplicable. Likewise, Mr. Heidbreder was not required to obtain a temporary permit for this event because he was not serving alcohol at it.

¹⁵ This is apparently a shorter version of Exhibit 78 submitted at the ATC hearing on this matter and was not included in the list of exhibits in the record submitted by the LB. This HJ believes so because the tape is date and time-stamped as it is being filmed. One of the segments is noted as January 3, 2003, which occurred well after the July 3, 2002 LB hearing.

¹⁶ Although mentioned mostly in passing before the LB, according to testimony before the ATC, this incident occurred on or about October 12, 2001, shortly after the 9-11tragedy. Apparently, the pilots of the helicopter wanted to eat at the permit premises, so they landed the aircraft in a field outside. The appropriateness of this action would appear to fall under the jurisdiction of the Federal Aviation Administration. Although the incident was deplored by the surrounding neighborhood, this HJ can find no violation of ATC rules in this regard.

¹⁷ Carryout is not permitted under a 210-1 permit.

intoxicated that he could not stand up. She said every time she calls the local police on a disturbance, when they arrive, the troublemakers are gone. She has never made a complaint with the Excise Police regarding the bar.

- C. EXHIBITS FOR THE PERMITTEE: No exhibits were offered or admitted at the LB in support of the permittee in this cause.
- D. EXHIBITS FOR THE REMONSTRATORS: The following exhibits were offered at the LB in support of the remonstrators and against the permittee in this cause:
- Indiana State Excise Police Memorandum from Officer Christopher 1. Bard to Officer Dean Hidalgo, dated June 12, 2002.¹⁸
- Copy of newspaper article entitled "Fireworks expected over liquor 2. license" from The Times of Northwest Indiana, July 2, 2002.
- Letter dated June 25, 2002 from Councilpersons Pamela M. Roth and 3. Paul Bremer to Richard Harrigan requesting that the permit renewal be denied.
- 4. Remonstrators' petition signed by approximately 263 individuals against the renewal of the petition in this matter.

III. EVIDENCE SUBMITTED BEFORE THE ATC

- The following witnesses testified before the ATC on behalf of the permittee in Α. this cause:
 - 1. Timothy Heidbreder. He owns 100% of the stock of Buddy & Pals, Inc. The permit premises opened around October 8, 2001. On June 1, 2001 he applied to the ATC for a permit for his establishment. He has never been cited for a violation of the ATC rules and regulations. He also owns an interest in another permit, which also has never been cited for a violation of ATC rules and regulations. 19 He stated that all of his employees go through the server training program presented by the State Excise Police. The entrances to the permit premises are either restricted or staffed so as to minimize the risk of overcrowding the establishment. If individuals are involved in disturbances, they are banned for life from the premises. According to Mr. Heidbreder, this fate has befallen around five individuals.
 - 2. David Uran, police officer, City of Crown Point. He investigated a complaint from Mr. and Mrs. Juarez regarding problems with Buddy & Pals.²⁰ He stated that the evewitnesses to the incident were unable to

restaurant in Valparaiso.

This was apparently the incident described by Mrs. Juarez which took place shortly before Christmas regarding the woman who yelled threats at her family after her car was towed from their property.

¹⁸ This exhibit, which gives details on three (3) particular police runs to the permit premises, and then lists a total of 28 different runs to the permit premises between October 12, 2001 and May 10, 2002, would be sufficient to support a finding of a public nuisance had one been made by the LB.

¹⁹ Mr. Heidbreder is the sole shareholder of Great Hospitality Corporation, which owns a permit in a

unable to agree on the person responsible based on photographic lineups conducted separately with each of them.²¹ He said that he is unaware of any serious felonies or misdemeanors committed at the permit premises. He reviewed the remonstrators' petition for intervention, and of the 263 signatures, only 72 of them lived within four (4) blocks of the permit premises.²²

- B. The following witnesses testified before the ATC on behalf of the remonstrators and against the permittee in this cause:²³
 - 1. Sue Miller, 810 North Jackson Street, Crown Point. Although her property is zoned I1 Industrial, it has been a residence since the turn of the century. She said that ever since the cargo helicopter incident the neighborhood has had a bad relationship with the permittee. There have been beer bottles found in the yards and tire ruts left in the lawns. She stated that on Thanksgiving morning, 2001, she had a meeting with Mr. Heidbreder regarding the problems at the bar, and in April, 2002, had a meeting with officials from the city, without success. Because parking was among the concerns discussed at the April 2002 meeting, Mr. Heidbreder advertised free parking on his billboard sign outside the bar, in what she felt was an attempt to mock the neighborhood's attempts at solving these problems. She said that before the permit premises opened, there were no police runs at the location in the previous fifteen (15) months.
 - 2. Mary Ann Juarez, 42 Foote Street, Crown Point. The permit premises is only eight (8) feet from her property line, and has turned what was the end of a dead-end street into a primary entrance and exit to the permit premises from the back of the permit premises lot. Since the bar has opened in October, 2001, she and her family have been denied the free use and enjoyment of their property. Her property is constantly used as a turnaround, and the accompanying blaring headlights, blasting stereos and acts of public indecency and litter have disturbed them at all hours of the night. She has had approximately 12 cars towed from her driveway, including one driver so intoxicated he was passed out in his vehicle, and another who cursed at her for having his SUV towed from her yard. Just before Christmas, she had two more cars towed from her yard, and a female patron of the bar became enraged, trespassed onto her property and

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²¹ This was offered to show why no charges were filed over the incident.

²² This HJ sees this as a significant number, claims to the contrary notwithstanding.

²³ Due to a recording error during the ATC hearing, the first 45 minutes were not recorded. This portion of the hearing covered solely the HJ's opening statement and a portion of a PowerPoint presentation by Geoffrey G. Giorgi, counsel for the remonstrators. There were no witnesses for either side who offered testimony during the portion of the hearing not recorded. This HJ believes that Mr. Giorgi's detailed PowerPoint presentation adequately covers the missing portion of the record and it is therefore included as an addendum with these findings.

²⁴ Although the record is not clear, this HJ has taken her comments to refer to the beginning of the 20th century as opposed to the 21st century, back when the area in question was first platted.

began screaming obscenities and threats at her home. This incident was witnessed by her children. She has feared for the safety of her home and family since the bar came to the neighborhood. Her car has been vandalized. She has installed new windows in her house to try to keep out the noise so her children can sleep at night. Just two weeks before the ATC hearing, she witnessed a woman leaving the permit premises parking lot at approximately 6:30 p.m., strike a car parked in her driveway and flee the scene. She said that in the last 15 months, her family has had to call the police more than 30 times regarding problems with the bar.

- C. The following exhibits were introduced before the ATC on behalf of the permittee in this cause:
 - 1. Form letter from permittee which is sent to individuals who are involved in disturbances on the premises informing them that they are no longer welcome on the premises.
 - 2. Letter from Lisa and William Marshall, IV to Tim Heidbreder in support of the permit premises.
 - 3. Minutes of the Crown Point Plan Commission May 29, 2001 Special Meeting.²⁵
 - 4. Minutes of the June 4, 2001 meeting of the Crown Point City Council.²⁶
 - 5. Zoning map of the City of Crown Point.
 - 6. Copy of the Crown Point zoning codes.
 - 7. Copy of letter from Crown Point City Legal to Rene Juarez, regarding a violation for operating a business in a residential zone.²⁷
 - 8. Copy of the petition for remonstrance previously introduced before the LB ²⁸
- D. The following exhibits were introduced before the ATC on behalf of the remonstrators and against the permittee in this cause:²⁹
 - 2. Photographs showing homes on Foote Street, Jackson Street and Merrillville Road.
 - 3. *Id.*, showing different homes.

²⁵ This exhibit shows that two of the remonstrators, Mr. and Mrs. Juarez, were present and tends to negate claims that the remonstrators had no knowledge of the zoning changes sought by Mr. Heidbreder.

²⁶ This exhibit shows that the permittee received approval for the zoning change from R3 Residential to B2 Business with respect to the permit premises.

²⁷ Mr. Juarez was cited for being improperly zoned for a business he was running from his residence, located a short distance south of the permit premises. The permittee introduced this exhibit in an attempt to show that at least with respect to remonstrator Juarez, the doctrine of unclean hands was at work. This HJ finds this document to be of little use in determining the case here.

²⁸ See, Exhibit 4, supra.

The record does not reveal the nature or whereabouts of Exhibits 1 and 7. Therefore, the HJ will list these exhibits according to their actual numbers.

- Id., showing different homes.³⁰ 4.
- *Id.*, showing different homes. 5
- Photograph showing the permit premises at night.³¹ 6.
- 8. Notice of Public Hearing for the change of zoning for the permit premises from R-3 residential to B-2 Business for 909 North Jackson Street.³²
- 9. A portion of the Crown Point zoning regulations showing permitted uses for, *inter* alia, a B-2 Business District.³³
- 10. A portion of the Crown Point zoning regulations requiring the proposed name of the development at issue.
- 11. Application for Site Development Plan Approval showing the owner as Heidbreder, Inc., for the planned project.³
- 12. Minutes of the Crown Point Plan Commission Special Meeting of May 29, 2001.
- 13. Copy of newspaper article entitled "Ordinance Divides Commission" from *The* Times of Northwest Indiana, February 11, 2003.
- 14. Copy of newspaper article entitled "Official to seek C.P. bar solution" from *The* Times of Northwest Indiana, January 9, 2003. 35
- 15. Copy of newspaper article entitled "CP locals voice bar concerns" from *The* Times of Northwest Indiana, April 25, 2002.
- 16. Copy of minutes from the Regular Council Meeting, June 4, 2001. 36
- 17. Copy of newspaper article entitled "Buddy & Pals receives offer" from *The Times* of Northwest Indiana, October 31, 2002.³⁷

³⁰ Exhibit 4 also shows children riding scooters on the sidewalk, further evidence that the area subject to this appeal includes the edge of a residential neighborhood.

³¹ Apparently the site, the intersection of Summit and Jackson streets, was formerly a home located at 909 North Jackson Street. This HJ would also note that the brilliant neon lighting which appears to go around the roof on three of the four sides (it is not apparent that the back side of the permit premises is illuminated) is extremely bright by any standard.

³² This exhibit shows that the notice of public hearing was for a change from residential to "Retail Business" and did not indicate that alcohol was to be served at the proposed location. The area residents claim that they were misled and deprived of an opportunity to object. However, such notice was not required under local zoning regulations, and further, the area residents had ample opportunity to inquire of petitioner Tim Heidbreder exactly what type of business he intended to put at that location.

³³ The remonstrators claim that because the permitted uses include retail businesses and eating and drinking establishments as separate categories, that the permittee misled them as to the type of business he intended to place there. However, there is no evidence that those categories are mutually exclusive or that one business could be described in more than one category.

³⁴ The remonstrators emphasize the fact that this form was to be submitted to the Plan Commission at least 12 days before the scheduled meeting date. The form was filed on May 18, 2001. The matter was considered on May 29, 2001, 11 days later. The ATC has no jurisdiction over the innerworkings of the Crown Point Plan Commission and acts only on the final result.

³⁵ Remonstrators emphasize that some members of the Plan Commission knew that a bar was going into the permit premises, but did not tell members of the public because the law did not require it at the time. This formed the basis for the ordinance referred to in Exhibit 13, which would have required bar owners to disclose their intent to place a bar or tavern when undergoing the rezoning process.

³⁶ This HJ is unsure whether this was county or city action.

³⁷ Remonstrators emphasize that councilpersons Pam Roth and Paul Bremer, along with Crown Point Mayor James Metros are quoted as saying that had they known that Mr. Heidbreder intended to place a bar at the location, that they never would have approved the rezoning. However, such evidence is irrelevant to the issue before the Commission in this license renewal.

- 18. Copy of letter from City of Crown Point Planning and Building, June 13, 2001, stating the site plan approval on the condition, *inter alia*, that Mr. Heidbreder install fencing or solid screening on the southern property line.
- 19. Copy of Crown Point Zoning Code §150.31 regarding the requirements for fencing on business property.
- 20. Photographs showing fencing behind the permit premises.³⁸
- 21. Minutes of the Crown Point Board of Zoning Appeals, June 25, 2001.³⁹
- 22. Minutes of the Crown Point Board of Zoning Appeals, December 27, 1995. 40
- 23. Copy of letter of December 27, 1995, from Crown Point Mayor James Metros objecting to a bar going in at that location.
- 24. Remonstrators' petition against Pete's Pub, December 27, 1995, Crown Point Board of Zoning Appeals.⁴¹
- 25. Public Record Copy Request from Susan Miller to the Indiana Alcohol & Tobacco Commission regarding the permits at issue in this matter.
- 26. Copy of letter of May 31, 2001 from attorney Robert D. Kuzman to ATC Chairman Clifford A. Ong accompanying Mr. Heidbreder's application for an alcohol permit for the permit premises and appropriate fees.
- 27. Copy of permittee's application for a Type 103 alcohol permit, dated June 1,
- 28. Copy of permittee's application for a Type 210-1 alcohol permit, dated June 1,
- 29. Copy of that portion of the application regarding the permittee's statutory qualifications to hold the permit.⁴²
- 30. Photograph of the site of the permit premises as of the time of the permit application in this matter.⁴³

³⁸ These photographs show that Mr. Heidbreder installed shrubbery instead of actual fencing materials, which, as of this photograph one can easily see through, and which the remonstrators claim have no leaves on the shrubs during the winter months, which would not appear to meet the standard required in Exhibit 19. *supra*.

³⁹ This exhibit refers to the hearing regarding the additional parking lot which would require a reduction in the rear yard space. Remonstrators emphasize that as of this hearing, at least one member of the board of zoning appeals thought that Mr. Heidbreder's permit premises was going to be an office building. This HJ would note that Mr. Heidbreder did nothing to correct that misconception.

⁴⁰ This exhibit shows that the neighborhood objected to a bar ("Pete's Pub") in 1995 going in the same vicinity. In that case, the proposed permittee made clear his intentions to put a bar at the location at issue, and the neighborhood remonstrated against the zoning change necessary for that to occur. The remonstrators in the instant case claim that Mr. Heidbreder was aware of this earlier failure and deliberately chose not to reveal his ultimate intent to put a bar at that location.

⁴¹ See, fn. 12, supra.

⁴² IC 7.1-3-4-2(a) lists conditions which disqualify a person from holding an alcoholic beverage permit. Here, remonstrators emphasize that Mr. Heidbreder told the ATC that his establishment contained a restaurant which was capable of serving at least 25 individuals at one time, which is the minimum qualifications for a restaurant on the permit premises. See, IC 7.1-3-20-9(b).

This photograph depicts a house at the location along with some construction vehicles on the premises. Remonstrators appear to emphasize that there was no restaurant open or operating as of the time of the permit application. However, the permit application process covers the time from application until the permit is awarded and is not frozen at any particular point in time. The law only requires that at the time the permit is put into operation, that the permittee have a restaurant which meets the minimum food and seating requirements of Indiana law. Since this permit was not in operation as of June 1, 2001, this HJ fails to see the deception complained of by the remonstrators.

- 31. Copy of Schedule GNL of the Application for Alcoholic Beverage Permit. 44
- 32. Copy of Schedule GNL-1 of the Application for Alcoholic Beverage Permit.⁴⁵
- 33. Copy of the petition containing names and addresses in support of the petition for the permit in this matter. 46
- 34. Copy of the same petition referred to in 33 above, but without the identifying information on the permit holder.⁴⁷
- 35. Copy of LB's note of approval, June 29, 2001, pending final application of floor plan. 48
- 36. Copy of District 1 Excise Police cover sheet fax, September 27, 2001, to ATC office in Indianapolis transmitting a copy of the final approved floor plan.
- 37. Copy of letter of authority for Permit No. RR45-19200 issued September 26, 2001 ⁴⁹
- 38. Copy of Type 103 Permit No. RR45-19200, approved by the ATC on July 18, 2001. 50
- 39. That portion of the application for an alcoholic beverage permit which requests the nature of the business.
- 40. Affidavit of food sales for Sunday permit dated November 26, 2001.⁵¹
- 41. Sunday Sales permit for Permit No. RR45-19201, issued on February 7, 2002.
- 42. New permit issued for Permit No. RR45-19201, February 22, 2002. 52

⁴⁴ This document pertains to the required floor plan of the permit premises. However, its relevance in this context is unclear. To the extent that the floor plan information is supposed to intimate that a restaurant exists on the site when at the time it did not, the form clearly contemplates and indeed, recommends that it be submitted in advance of actual construction.

⁴⁵ This schedule pertains to obtaining a prerequisite number of signatures in support of a permit before applying for that permit. The ATC no longer requires this information.

⁴⁶ This form was apparently received by the ATC on June 1, 2001. Remonstrators claim that this same petition was sent for two locations on two separate dates. However evidence of the second location is not in this record.

⁴⁷ This exhibit shows that it was received by the ATC on March 7, 2002, possibly in conjunction with Mr. Heidbreder's application for a different permit in Winfield. However, that information was no longer required.

⁴⁸ Remonstrators appear to take issue with the fact that the application recommended for approval pending final approval of the floor plan. However, such action is routine.

⁴⁹ Letters of authority are issued by the ATC *after* a permit has been recommended for approval by the LB but before the recommendation has been approved by the ATC under certain circumstances, all of which were met in this case. Such a letter allows a new permittee to operate in the absence of a permit on the wall during the time that the LB recommendation is being considered by the ATC and receipt by the permittee of the permit, which takes an average of 2-4 weeks after the LB hearing. Remonstrators make much of the fact that the letter of authority at issue speaks only to the Type 103 and not to the Type 210-1. This appears to be an oversight of the Commission and does not reflect any improper conduct of the permittee, as the intent and normal practice is to issue the letter of authority on the 210-1, which permittee apparently assumed.

⁵⁰ This underlying beer retailer permit was essential for Mr. Heidbreder to obtain his Type 210-1 pursuant to IC 7.1-3-20-22(a). Remonstrators claim that there was no Type 210-1 permit in the file as of May 14, 2002. However, a review of the file for Permit No. RR45-19201 (Type 210-1) shows clearly that this 3-way permit was issued to petitioner Mr. Heidbreder on July 18, 2001.

⁵¹ Remonstrators claim that Mr. Heidbreder fails to make the required food sales. However, permittee has complied with IC 7.1-3-16.5-3(d), by providing the requisite food figures. Even though the food served as of the execution of the certification is insufficient, in accordance with IC 7.1-3-1-27, petitioner is allowed two (2) years in which to meet the requirements for the sale of food. In the alternative, petitioner may now obtain a Sunday sales permit without meeting the food requirements pursuant to IC 7.1-4-4.1-9(d)(2).

- 43. Copy of the first page of 2002 renewal of alcoholic beverage permit, dated April 22, 2002.
- 44. Records of calls from various callers to ATC and State Excise Police.⁵³
- 45. Photograph of sign advertising that "Buddy & Pal's Place" would be coming soon ⁵⁴
- 46. An advertising page from the permittee website.
- 47. Another advertising page from the permittee website.⁵⁵
- 48. Photographic ad referring to activities at the permit premises.
- 49. Additional photograph on permittee website, with attached photograph showing the addition of patio doors. 56
- 50. Another advertising page from the permittee website.⁵⁷
- 51. Copy of newspaper article entitled "One injured in fight outside C.P. tavern" from *The Times of Northwest Indiana*, November 13, 2001. 58
- 52. Another advertising page from the permittee website.⁵⁹
- 53. Photographs (2) taken during the November 1, 2001 tailgate party in the parking lot of the permit premises.⁶⁰
- 54. Additional advertisement from permittee's website.
- 55. Additional advertisement from permittee's website.
- 56. Additional advertisement from permittee's website. 61

⁵² The original 210-1 permit issued on July 18, 2001 to Timothy Heidbreder himself was transferred to Buddy & Pals, d/b/a Buddy & Pals Place, a company formed by Mr. Heidbreder to hold the permit. ⁵³ This exhibit claims 21 calls made from various individuals to ATC regarding the permit premises. However, nothing in the record connects these calls directly to the permit premises.

Remonstrators claim that this was the first notice they had that a bar was coming to the location. They claim that petitioner failed to comply with IC 7.1-3-1-28 requiring the posting of signs notifying of the

intent to place a permit at the location in question. *See*, fn. 8, *supra*.

55 Remonstrators claim that permittee fails to meet the "character of business" test set forth in IC 7.1-3-1-19. However, that test is only used in the context of a grocery or pharmacy dealer permit. Remonstrators further claim that IC 7.1-3-20-11.5 is restricted to established restaurants. This HJ disagrees. The permit process, including this statute, allows for new permits at new establishments.

⁵⁶ Remonstrators claim that the addition of the patio doors constitutes a change in floor plan without adequate notice. Regardless, permittee was not cited for this action.

⁵⁷ This photograph shows the Sunday, November 11, 2001 tailgate party which was held in the parking lot of the permit premises. Remonstrators claim that permittee violated 905 IAC 1-41-4 because premises were a *de facto* beer garden and the parking lot was not fenced in and accessible only from inside. During this event, the permit premises were locked and the participants in the tailgate party furnished their own alcohol. Because permittee was not serving any alcohol at this event, Rule 41 is inapplicable. Likewise, Mr. Heidbreder was not required to obtain a temporary permit for this event because he was not serving alcohol at it.

⁵⁸ No violations were filed against permittee as a result of this incident.

⁵⁹ This page shows 36 photographs on a 6x6 photographic grid, documenting various activities that have occurred both inside and outside the permit premises. One of the photographic squares is blank with the caption entitled "Oops! Somebody complained!" Remonstrators claim this is an attempt to mock the neighbors who are upset at the presence of the permittee at this location. This HJ agrees that this ad, though not illegal, shows obvious insensitivity to the feelings of the neighbors and is in extremely poor taste.

⁶⁰ These photographs show individuals drinking alcoholic beverages in the parking lot of the permit premises. Remonstrators claim this to be a violation of IC 7.1-5-8-4 which prohibits one from bringing alcoholic beverages onto a permit premises. However, because the parking lot is not on the permit premises floor plan, this statutory prohibition is inapplicable.

- 57. Photograph of a band performing inside the permit premises.⁶²
- 58. Additional advertisement from permittee's website.
- 59. Photographic display of baby pictures of employees of the permit premises with a contest to match the picture with the employee and win a free pitcher of beer. 63
- 60. Advertisement for Monday specials with \$.25 beers with the purchase of a pizza.⁶⁴
- 61. Additional advertisement from permittee's website. 65
- 62. Copy of newspaper article entitled "Owner of Winfield pub seeks support" from The Times of Northwest Indiana, October 19, 2002.
- 63. Photograph showing a helicopter landing in a field outside the permit premises.
- 64. Photograph showing empty beer bottle in the front yard of a residence.
- 65. Additional photographs (2), each showing an empty bottle on the ground.
- 66. Additional photographs (2), each showing empty bottles on the ground.
- 67. Additional photograph showing empty beer bottles on the ground. 66
- 68. Additional photographs (2) showing a beer bottle in the street and a beer bottle in a parking lot.
- 69. Photographs (2) showing tire tracks across residential lawns.⁶⁷
- 70. Additional photographs (3), two of which show tire tracks across residential lawns, and a third which shows a car which appears to have at least two of its wheels parked on the grass.
- 71. Photographs (2) showing scenes from the permit premises parking lot.
- 72. Additional photograph showing a scene from the permit premises parking lot.
- 73. Photograph showing vehicle damage allegedly caused by an explosive device. 68
- 74. Neighborhood announcement showing a meeting set for April 23, 7:30 p.m., City Council Chambers, to address issues regarding Mr. Heidbreder's desire to expand his parking lot.

⁶¹ This advertisement page pertains to musical entertainment provided by permittee. Remonstrators claim that the necessary fire marshall permit was not obtained between October 7, 2001 and July 1, 2002. Regardless, that is a concern of the Office of the State Fire Marshall and is not within this Commission's jurisdiction.

⁶² Remonstrators complain that the bands draw excessive crowds and that the music can be heard across residential lot lines. This HJ would agree that music being played inside which is clearly audible outside the permit premises beyond the parking lot is unacceptable.

⁶³ This practice violates IC 7.1-5-5-7. A permittee cannot give away alcohol to selected customers, but must make the same favor available to everyone on the premises.

⁶⁴ *Id.* This is another form of price discrimination.

⁶⁵ This advertisement page emphasizes the relationship between the permittee and the Italian Out-Post, which runs the kitchen/restaurant. The remonstrators claim that the restaurant has different hours than the bar. While such an arrangement is not a good business practice, there is no violation of the minimum food requirements if the restaurant is closed even though the bar is open, so long as a patron has access to the minimum food required to be served. There was no evidence presented here that a person was physically unable to obtain food from the minimum required service even though the kitchen was officially closed. ⁶⁶ A notation in the lower right corner of the photo indicates "02/22/2003", and this HJ will assume that it

was taken on that date. ⁶⁷ Remonstrators claim that these tire tracks are left by patrons of the permit premises who park on private

property without permission. This is further evidence of the problem which the permit premises has caused for the surrounding neighborhood. Remonstrators are certainly free to have these cars towed off of their property at the expense of the car owner.

68 There was no evidence presented that any patron of the permit premises caused this damage.

- 75. Photograph of permit premises, showing permittee's billboard sign which reads "FREE PARKING ALL WEEKEND".⁶⁹
- 76. Additional advertising pages from permittee's website featuring activities for the months of May and June, 2002.
- 77. Additional advertising pages from permittee's website.
- 78. Videotape of activities occurring outside the permit premises in the parking lot depicting the following activities occurring on property owned by the permittee or within 300 feet of it: (1) large group of motorcycle riders leaving the parking lot, the noise from the motorcycles plainly audible within the residential area surrounding the premises; (2) two individuals appear to be engaging in sexual relations in their vehicle less than 50 feet from the front porch of a residence; (3) yelling and use of profane language outside, plainly audible along with the screeching of automobile tires of cars leaving the permit premises parking lot; (4) public indecency (urination) in the permit premises overflow parking lot immediately adjacent to its premises; (5) people yelling outside in the middle of the night, plainly audible and less than 100 feet from residents' bedroom windows; (6) hit and run accident occurring on the permit premises parking lot; (7) parking lot and all overflow lots full; remonstrators claim over 150 cars counted, and the capacity of the permit premises 135 individuals; (8) carrying beer bottles off premises, in violation of Type 210-1 permit, many of which end up in the yards of area residents and businesses; (9) squad car belonging to bar patrons hitting sirens at approximately 2:00 a.m., then patrons yelling back and forth between the squad car and an SUV; (10) motorcycle noise clearly audible from a distance of more than 300 feet; (11) more public indecency (urination) in the overflow parking lot next to the parking lot owned by the permittee; (12) music blasting and clearly audible outside from bands performing inside the permit premises; (13) glass bottles being dumped into dumpsters in the middle of the night by permittee employees; (14) outside screaming and profanity, clearly audible; (15) suspicious activity by bar patron who leaves the bar, goes to his truck and returns to the bar; (16) suspicious exchange between bar patron or employee who leaves the bar, meets an individual in the parking lot behind the bar, completes some type of transaction, returns to the bar and the individual in the parking lot drives off; (17) patron leaving the overflow parking lot making excessive noise and squealing tires; (18) honking of a car horn in the middle of the night for reasons indiscernible; (19) woman left in street near permit premises after a verbal fight with acquaintance, altercation clearly audible; (20) woman urinating in main parking lot of the permit premises. 70

⁶⁹ Remonstrators claim that this sign was posted after the April 23rd meeting in the City Council Chambers which was supposed to address issues surrounding the plans to expand the permit premises parking lot. This HJ agrees, that given the timing and the message posted, it was an attempt to mock the neighbors and shows extreme insensitivity on permittee's part.

⁷⁰ This ten (10) minute total video was apparently shot from various locations by more than one camera. And on multiple days. To this HJ, the video, even though it shows no violations inside the permit premises, shows numerous violations being committed outside on property owned by the permittee, or used by him for a substantial benefit. IC 7.1-2-6-1(a)(3) covers business property, which includes parking lots. The actions on this videotape are clearly sufficient to support a finding of a public nuisance even though the LB declined to make such a finding. Additionally, this HJ has no doubt that the incidents on it are directly

VI. FINDINGS OF FACT

- 1. The Permittee, Buddy & Pals Inc., 499 East Summit Street, Crown Point, Indiana 46307 (Permittee) is the holder of a type 103 and 210-1, Alcohol and Tobacco Commission (ATC) permit, permit #RR45-19200 and RR45-19201. (ATC File).
- 2. Said permit was first issued on July 18, 2001 to Timothy Heidbreder. (ATC File).
- 3. On February 22, 2002, the permit was transferred to Buddy & Pals, Inc., a corporation owned by Mr. Heidbreder, and a new Sunday sales permit was issued. (ATC File).
- 4. Mr. Heidbreder owns 100% of Buddy & Pals, Inc. (ATC Hearing).
- 5. Prior to the permit premises being constructed, the location in question was zoned R-3 Residential. (ATC Hearing).
- 6. In anticipation of placing a permit at the above location, Mr. Heidbreder initiated a zoning change from R-3 Residential to B-2 Business, which concluded with a successful change on June 4, 2001. (ATC Hearing).
- 7. Mr. Heidbreder indicated on his application for change of zoning that he was putting a "retail business" on the site. (LB Hearing; ATC Hearing).
- 8. The City of Crown Point Zoning Board allows for a B-2 Business to include one (1) of nine (9) categories, including "retail business" and "eating and drinking establishments". (LB Hearing; ATC Hearing).
- 9. During the course of the zoning proceedings, the remonstrators had ample opportunity to question Mr. Heidbreder as to the kind of "retail business" he intended to place on the site. (LB Hearing).
- 10. During the course of the zoning proceedings, the remonstrators failed to inquire of Mr. Heidbreder as to the kind of "retail business" he intended to place on the site. (ATC Hearing).⁷¹
- 11. The application in this matter was for a retail permit to sell alcoholic beverages. (ATC File).

related to intoxicated patrons leaving the permit premises. It is obvious that the permittee's patrons' actions have caused harm to the surrounding neighborhood and it is also unfortunately apparent that the permittee feels little obligation to address these concerns. Moreover, this HJ feels that the conduct displayed on this videotape is not isolated, but likely occurs on or around the permit premises on a regular basis. These incidents cross the line of what permit holders may permit their patrons to do on business property, and this HJ finds that the permittee owes a duty to the surrounding neighborhood to minimize destructive acts flowing directly from patrons' intoxication, to the extent that it is able to do so. This HJ does not mean to suggest that all loud and boisterous activity can be eliminated, but here, permittee has not only disclaimed any responsibility for these actions, but has done absolutely nothing to try to improve the situation.

⁷¹ Although several individuals involved in the zoning procedure seemed to be unaware that Mr. Heidbreder intended to place a bar at the location in question, because the adversarial nature of the zoning procedure assumes that all parties will fully investigate and prosecute their respective cause, this HJ declines to find under these facts that Mr. Heidbreder deliberately misled the remonstrators and actively concealed from them his intent to open the permit premises at this location.

- 12. Mr. Heidbreder did not post any sign at the site of the permit premises while the matter was pending before the LB. (LB Hearing; ATC Hearing).
- 13. Construction on the building had not yet begun at the time that Mr. Heidbreder filed his application for a permit. (ATC Hearing).
- 14. The following constitutes the official records of the Commission with respect to the permit process in this matter from the time the initial request was filed until the final transfer petition was approved: (ATC File)
 - a. On June 1, 2001, the ATC first received the application for the permit in this matter. (ATC File).
 - b. On June 29, 2001, Mr. Heidbreder filed his floor plan with the Commission. (ATC File).
 - c. On July 5, 2001, the matter was heard and recommended for approval by the LB. (ATC File).
 - d. The permit in this matter was granted to Mr. Heidbreder on July 18, 2001. (ATC File). 72
 - e. At the time of the approval, Mr. Heidbreder needed a final inspection. (ATC File).⁷³
 - f. On September 26, 2001, Mr. Heidbreder received a final inspection on the permit premises. (ATC File).
 - g. On December 17, 2001, Mr. Heidbreder filed a petition for transfer of the permit from himself to Buddy & Pals, Inc., and also applied for a separate Sunday sales permit. (ATC File).
 - h. On February 7, 2002, the transfer petition was heard and recommended for approval by the LB. (ATC File).
 - i. On February 22, 2002, a new permit was issued to Buddy & Pals, Inc., along with an accompanying Sunday sales permit. (ATC File).⁷⁴
- 15. On or about October 8, 2001, permittee opened for business. (LB Hearing; ATC Hearing).
- 16. The permit premises has a capacity of 135 persons. (ATC Hearing.)
- 17. On Sunday morning, November 11, 2001, Mr. Heidbreder held a tailgate party on the parking lot of the permit premises; The building itself was locked, and everyone who attended brought their own alcohol for their own consumption; during the tailgate party, Mr. Heidbreder furnished no alcohol to anyone who attended.
- 18. At noon, on November 11, 2001, the tailgate party concluded and Mr. Heidbreder told everyone that they had to put their alcohol away because he would be opening up the permit premises within a few minutes.
- 19. Mr. Heidbreder opened the permit premises on November 11, 2001 and engaged in the sale of alcoholic beverages.⁷⁵

⁷² This permit allowed the permittee to sell alcoholic beverages six (6) days per week *per* IC 7.1-3-1-14(a).

⁷³ The purpose of a final inspection is to ensure that the permit premises complies with the previously submitted floor plan. The Commission routinely approves permits which have been recommended for approval by local boards and which are awaiting a final inspection. This "approve and hold" process means that although the issuance of the permit is approved, it is held until the final inspection sheet is filed with the Commission, which in this case was September 26, 2001. It appears here that the permit was issued before the construction of the permit premises was completed.

⁷⁴ It was not until this date that permittee could legally sell alcoholic beverages on Sunday.

- 20. The November 11, 2001 tailgate party was the only such event held on the permit premises.
- 21. There were no remonstrators present at the transfer hearing before the LB. (ATC Hearing).
- 22. The permit premises attracts significant business and appears to operate successfully at its location. (LB Hearing; ATC Hearing).⁷⁶
- 23. The permit premises has its own parking lot, which sits on land owned by the permittee, but is not on its floor plan. (ATC Hearing).
- 24. The permit premises has the benefit of the use of adjacent parking lots in the evenings when its own parking lot is full. (ATC Hearing).
- 25. The overwhelming majority of persons who use the overflow lots are customers of the permit premises who cannot find a parking spot in the permittee's own parking lot. (ATC Hearing).
- 26. The permittee has received no citations for any infractions of the ATC statutes or regulations since it has opened. (ATC File).⁷⁷
- 27. The patrons of the permit premises have caused numerous problems for the residents of the surrounding neighborhood and have committed the following acts which have disrupted the peace of the neighborhood or are violations of the Indiana Criminal Code in the following ways since the permit premises have opened:⁷⁸
 - a. large group of motorcycle riders leaving the parking lot, the noise from the motorcycles plainly audible within the residential area surrounding the premises;
 - b. individuals engaging in sexual relations in their vehicle less than 50 feet from the front porch of a residence;
 - c. yelling and use of profane language outside, plainly audible along with the screeching of automobile tires of cars leaving the permit premises parking lot;
 - d. public indecency (urination) in the permit premises overflow parking lot immediately adjacent to its premises;

⁷⁶ Indeed, there was a total lack of evidence to suggest that the permit premises does not pull in a significant crowd on a daily basis. While the neighborhood obviously is unhappy with the presence of the bar, the patrons it attracts nonetheless show that there is a significant desire for the services to be received at that location.

⁷⁵ This was a violation of the prohibition of selling alcohol on Sunday without a permit, regardless of the fact that he was not cited for it.

⁷⁷ Permittee does not absolve itself of the problems complained of here based on this virtue alone. The fact is that for the most part, the remonstrators have very little concern with what goes on inside the permit premises. What they are most unhappy about is what comes out the door and the effect it has on their neighborhood.

⁷⁸ The following subparagraphs (a) through (t) are scenes from Exhibit 78, a videotape made of incidents committed by patrons of the permit premises and occurring on its parking lot or a neighboring overflow lot from which permittee derives a direct benefit. These incidents occurred on the dates of June 21, 2002, June 22, 2002, November 24, 2002, November 27, 2002, November 29, 2002, December 31, 2002 and January 4, 2003. The scenes were date and time stamped throughout the video and this HJ assumes them to be accurate.

- e. people yelling outside in the middle of the night, plainly audible and less than 100 feet from residents' bedroom windows;
- f. hit and run accident occurring on the permit premises parking lot;
- g. parking lot and all overflow lots full; remonstrators claim over 150 cars counted, and the capacity of the permit premises 135 individuals;
- h. carrying beer bottles off premises, in violation of Type 210-1 permit, many of which end up in the yards of area residents and businesses;
- i. squad car belonging to bar patrons hitting sirens at approximately 2:00 a.m., then patrons yelling back and forth between the squad car and an SUV;
- j. motorcycle noise clearly audible from a distance of more than 300 feet;
- k. more public indecency (urination) in the overflow parking lot next to the parking lot owned by the permittee;
- 1. music blasting and clearly audible outside from bands performing inside the permit premises;
- m. glass bottles being dumped into dumpsters in the middle of the night by permittee employees, the noise clearly audible to surrounding neighbors;
- n. outside screaming and profanity, clearly audible;
- o. suspicious activity by bar patron who leaves the bar, goes to his truck and returns to the bar;
- p. suspicious exchange between bar patron or employee who leaves the bar, meets an individual in the parking lot behind the bar, completes some type of transaction, returns to the bar and the individual in the parking lot drives off;⁷⁹
- q. patron leaving the overflow parking lot making excessive noise and squealing tires;
- r. honking of a car horn in the middle of the night for reasons indiscernible;
- s. woman left in street near permit premises after a verbal fight with acquaintance, altercation clearly audible;
- t. woman urinating in main parking lot of the permit premises;
- u. permittee patrons driving across residential lawns and parkways;
- v. permittee patrons parking illegally in the driveways of residents resulting in residents having to have those cars towed away, and incurring the wrath of those same permittee patrons when they return to find their cars missing;
- w. permittee patrons discarding illegal carryout bottles in the yards of surrounding residents.
- 28. The conduct depicted on ATC Exhibit 78, *supra*, was not isolated to the dates and times stamped on the video, but rather, is a regular occurrence. 80

⁷⁹ This HJ wonders whether this portion of the tape depicts an illegal drug transaction, with which these actions would be consistent.

⁸⁰ Both Mrs. Miller and Mrs. Juarez testified that the problems have continued essentially unabated since the permit premises opened. This HJ has no reason to doubt otherwise. The video was taken during different times of the year and yet the conduct is consistent. Moreover, the permittee never challenged this portion of the remonstrators' evidence, but rather, disclaimed any responsibility for it because it occurred outside the four walls of the permit premises.

- 29. Area residents have called the police on dozens of occasions based on the conduct of patrons of the permit premises.⁸¹
- 30. The problems suffered by the remonstrators are caused by the patrons of the permittee, in most instances, by their actions and conduct on the permittee's parking lot or nearby overflow lots. (ATC Hearing).
- 31. Permittee could help alleviate the problems caused by its patrons by providing outdoor security detail in its parking lot and overflow lots used by its patrons.⁸²
- 32. The presence of a working security detail would help minimize the occurrences of which the neighborhood residents complain. 83
- 33. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

V. CONCLUSIONS OF LAW

- 1. The Permittee, Buddy & Pals Inc., 499 East Summit Street, Crown Point, Indiana 46307 (Permittee) is the holder of a type 103 and 210-1, Alcohol and Tobacco Commission (ATC) permit, permit #RR45-19200 and RR45-19201. (ATC File).
- 2. Said permit was first issued on July 18, 2001 to Timothy Heidbreder. On February 22, 2002, the permit was transferred to Buddy & Pals, Inc., a corporation owned by Mr. Heidbreder, and a new Sunday sales permit was issued. (ATC File).
- 3. Timothy Heidbreder, president of permittee, is a person of good moral character and good repute. 905 IAC 1-27-1.
- 4. Permittee is qualified to hold the permit applied for in this appeal. IC 7.1-3-4-2(a); 905 IAC 1-27-1.
- 5. Permittee was not required to post notice when applying for the permit at issue here because the law did not require him to do so at the time he applied. IC 7.1-3-1-28.
- 6. The ATC does not have jurisdiction over the zoning issues raised in this case. IC 7.1-3-1-5.5(j). 84
- 7. The ATC has broad discretion to issue or deny an application for a retail liquor permit. IC 7.1-3-19-1; *Indiana Alcoholic Beverage Commission v. State ex rel. Harmon*, 269 Ind. 48, 379 N.E.2d 140 (1978).

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⁸¹ Given the testimony of the remonstrators this HJ sees no need to belabor this point.

⁸² Although not specifically discussed in the record, this would seem to be a common-sense solution which would greatly alleviate many of the problems seen here, and thus this HJ believes it appropriate to make this assumption under these circumstances. Given the popularity of the permit premises, it seems difficult to conceive that the costs involved would outweigh the benefits to both the permittee and the neighborhood.

⁸³ *Id.* This would include loud individuals or vehicles, public indecency, intoxicated patrons striking other cars as they try to leave the parking lot.

⁸⁴ This section, requiring compliance with all zoning laws, is applicable only to Marion County. Even if it were applicable statewide, remonstrators have shown no zoning violations that would appear to entitle them to relief.

- 8. The Commission may review an application for such a permit in whatever manner it deems best and may grant or refuse the application "as it deems the public interest shall be served best." *Id.; Harmon*, at 140.
- 9. In order to constitute a public nuisance, it must be shown that the premises have become the scene of acts which are prohibited by the Indiana Penal Code (IC 35-41-1-1, *et.seq.*), or a criminal offense under the laws of the United States. 905 IAC 1-27-2.
- 10. A violation of law is not limited to a violation of the alcoholic beverage law. IC 7.1-2-6-1(a); *O'Banion v. State ex.rel. Shively*, 1969, Ind.App., 253 N.E.2d 739, 743.
- 11. It is not necessary for the actions which constitute a public nuisance to be determined by the Commission beyond a reasonable doubt. 905 IAC 1-27-3.
- 12. It is not necessary for any illegal actions committed on the permit premises to be connected to the permittee or the owners of the permit. 905 IAC 1-27-2.
- 13. A nuisance is also something that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property. IC 32-20-6-6.
- 14. A nuisance under IC 32-20-6-6 is subject to the laws governing public nuisances under IC 7.1-2-6, *et seq. O'Banion, supra*.
- 15. For purposes of determining whether the permit premises have become a public nuisance, it is sufficient that the complained-of conduct by a person not a permittee be done on premises owned by the permittee in which an alcoholic beverage is sold or consumed, in violation of a rule or regulation of the Commission. *Id*.
- 16. Permittee's Type 210-1 permit does not allow for beverage carryout privileges. IC 7.1-3-20-11.5(a).
- 17. Permittee's patrons' acts of consuming carryout beverages outside the permit premises are in violation of the scope of its permit and thus against the regulations of the Commission. *Id*.
- 18. The actions of the patrons of the permit premises which occur on the parking lot of the permit premises as well as the adjacent overflow lots used by permittee's patrons are injurious to health, indecent, offensive to the senses or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment by the neighborhood residents of their property. *Id.*, IC 32-20-6-6.
- 19. Actions occurring in the parking lot owned by a permittee are subject to the regulations regarding public nuisances. IC 7.1-2-6-2.
- 20. The Commission's objectives are, *inter alia*, to protect the economic welfare, health, peace and morals of the people of this state. IC 7.1-1-1(1).
- 21. There is a reasonable connection between actions taken by a permitee's patrons on its parking lot(s) or adjacent parking lots owned by others but used for the benefit of permittee or its patrons and the economic welfare, health, peace and morals of the people of the surrounding neighborhood.
- 22. Where there is a causal relationship between the conduct of a permittee's patrons outside the permit premises, either on its own parking lot or adjacent lots owned by others but used for the benefit of permittee or its patrons, the

- permittee owes the surrounding neighborhood a duty to minimize those actions which could cause a disturbance of the peace and quiet enjoyment of neighboring property owners.
- 23. Since the Commission has the absolute discretion to issue or deny a permit of any type, it has the inherent lesser authority to require a permittee to agree to certain conditions of operation if it wishes to continue to hold its permit. IC 7.1-3-19-1.
- 24. The Commission has the authority to require a permittee to monitor the conduct of its patrons on property it owns or that is owned by others but which use directly or indirectly benefits the permittee, such as a parking lot, so as to prevent its patrons from disturbing the peace of the surrounding businesses or neighborhood. *Id.*
- 25. The Commission will only reverse the LB's action in recommending renewal of said permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. IC 7.1-3-19-11.
- 26. The LB's action in granting the renewal application of the permit in this matter was not (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. 85 *Id*.
- 27. Where the facts as found by the HJ would have supported a finding of a public nuisance even though such a finding was not made by the LB, the Commission may require the permittee to take additional steps to reduce or eliminate the problems and may suspend the permit if the permittee fails or refuses to do so.
- 28. The Commission will require permittee to employ or contract with security detail outside its premises on a nightly basis with respect to the parking lot it owns and any adjacent lots used by its patrons while they are inside the permit premises. Permittee shall employ or contract with this security detail no later than May 1, 2004 and have said security detail in place and operational no later than April 30, 2004. The permit in this case shall be suspended beginning May 1, 2004, for each day that this security detail is not in place.
- 29. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

⁸⁵ Although this HJ declines to reverse the recommendation of the LB, it is strongly stressed to the permittee that the facts as shown by the remonstrators would have more than adequately justified a finding of a public nuisance had one been made by the LB.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the recommendation of the LB to grant the renewal application in this matter was not arbitrary and capricious, was not contrary to a statutory or constitutional right or privilege, was not in excess of constitutional, statutory or regulatory authority, was not without observance of procedures required by law, and was based on substantial evidence and will be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing, while not inconsistent with the recommendation of the LB, was still sufficient for a finding of a public nuisance, had one been made, and justifies the imposition of an additional term and condition with which permittee must comply to continue to hold and operate this permit, namely, that the Permittee shall employ or contract with a duly licensed security detail no later than April 30, 2004 and have said security detail in place and operational no later than April 30, 2004. The permit in this case shall be suspended beginning May 1, 2004, and shall remain suspended for each day that this security detail is not in place. The appeal of the remonstrators for denial of the application of renewal of the Type-103 and 210-1 permits, Nos. RR45-19200 and RR45-19201, is denied and the renewal application of said permit applied for is hereby granted, subject to compliance with the above special condition.

DATED:	
	MARK C. WEBB, Hearing Judge